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Supreme Court of the United States

OCTOBER TERM, 1963

No. 471

JUDY BOND, INC.,

Petitioner,

against

CHARLES KREINDLER, as Financial Secretary of BLOUSE AND WAISTMAKERS' UNION, LOCAL 25, I.L.G.W.U.,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Statement

This memorandum is written in reply to certain statements contained in respondent's brief in opposition to petitioner's petition for a writ of certiorari herein.

ARGUMENT

POINT I

A Federal question was raised herein.

Throughout its brief the Union tries to create the impression that the Federal questions discussed in the petition herein were afterthoughts made only after Judy Bond was unsuccessful in the state courts.

This attitude is quite startling in view of the Union's prior positions. In fact, the Union itself raised the Federal issues presented herein in Supreme Court, New York County. The Union's first point in its memorandum of law before Supreme Court, New York County was entitled "THIS PROCEEDING IS GOVERNED BY FEDERAL LAW." The memorandum then spent some five pages arguing that under *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962) and other decisions of this Court, the New York State courts were obligated to apply Federal law in this type of action. This contention was never challenged by Judy Bond, as indeed, it is unassailable. Apparently, the Union's strategy is to say correctly that this case concerns Federal law when it is before a state court and then to say incorrectly that it concerns state law when it is before a Federal court.

Moreover, both before the Appellate Division and the Court of Appeals, Judy Bond discussed and cited Federal authorities with respect to both questions presented by the petition herein.

We submit, therefore, that the Union's attempt to ignore these discussions as well as its own prior position is merely an attempt to divert this Court's attention from the real issues of this case.

POINT II

Judy Bond was deprived of a substantial right by its failure to receive a hearing on the facts of its anti-trust allegations.

The Union contends that all that is involved in the first question is matters of state court procedure and accordingly this Court need not trouble itself with this

issue. While obviously this Court cannot concern itself with the minutiae of state court procedure in every Section 301 case brought in a state court, we submit that it has a vital concern when what is denominated as state court procedure, in effect, precludes a party from proving a substantial claim, particularly one involving the Federal antitrust laws.

The Union tries to analogize what happened here to the long-accepted procedure of allowing motions to dismiss a complaint or for summary judgment. An examination of both analogies not only points out their inapplicability to this situation, but also the inherent justice of Judy Bond's position.

Thus, although courts will grant a motion to dismiss a complaint for "failure to state a claim on which relief can be granted" or some equivalent statutory standard (see Rule 12 (b)(6) of the Federal Rules of Civil Procedure) it is readily evident that this is not applicable here since Judy Bond has alleged a good "claim". Supreme Court, New York County itself recognized this herein when it stated in its opinion:

> "The provisions of paragraphs 32 and 33 of the agreement require employers to use only union contractors, registered by the employer with the union. These provisions do not violate the anti-trust laws (Allen Bradley Co. *v.* Union, 325 U. S. 797; Matter of Terry Lee [Sportswear], N. Y. County Clerk's No. 12801-1956, aff'd 3 App. Div. 2d 649; see fols. 69-70 of record on appeal; see also Mencher *v.* B. Geller & Sons, Inc., 276 App. Div. 556; Davis Pleating and Button Co. *v.* California Sportswear and Dress Association, 145 F. Supp. 864). *It is true that a different conclusion might be necessary if the contractual provision was used for the purpose of enabling certain employers or businesses to*

monopolize the market and the union was a co-conspirator with them (Allen Bradley v. Local 3, supra)." (Emphasis supplied.)

It is almost self-evident that Judy Bond has alleged a good "claim". The only quarrel anyone can have is that it has not as yet proved the allegations of its "claim". But this it was prevented from doing by the procedure adopted by the courts below.

The other Union analogy to a motion for summary judgment is equally inapt. It has long been held that a motion for summary judgment will not lie merely because a defendant swears in an affidavit that it has not done the acts in question. This rule was succinctly stated in *Belanger* v. *Hopeman Bros.*, 6 F.R.D. 459, 461 (D. Maine, 1947):

> "I think this indicates some misconception of the rule [Rule 56, Federal Rules of Civil Procedure]. Its purpose is to enable parties to a case in court, by filing pleadings, affidavits and admissions, or otherwise, to squeeze out of the case all matters in controversy, except the law, and to authorize the court to give judgment on undisputed facts. But that is not accomplished by merely reasserting in affidavit form a defense already set up in the answer. An assertion which amounts to nothing more than a denial of the existence of the statutory situation which creates the right of action does nothing to lessen the issues involved, unless admitted. A party to an action cannot push the other party out of court by swearing he has no case."

Essentially, this is all the Union herein is doing. Its affidavits merely swear to its allegations that it is innocent. Moreover, this analogy is flatly contradicted by this Court's decisions, which we cited in the petition, in *Poller*

v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962) and *White Motor Co. v. United States*, 372 U. S. 284 (1963) which unmistakably hold that summary judgment must be used sparingly in antitrust cases.

The Union summarized Judy Bond's contentions on page 10 of its brief by the proposition that "a hearing based upon affidavits is a deprivation of a federal right". We submit that this grossly over-simplifies the question. What we are contending is that in a proceeding governed by Federal law, a party should not be restricted to affidavits but must be given the right to prove at a full hearing its substantial Federal antitrust contentions. This right, we submit, was never given to Judy Bond.

The Union admits on page 5 of its brief that Judy Bond could not have presented the antitrust issues to the Arbitrator. The ruling of Supreme Court, New York County was based only upon affidavits. Judy Bond alleged conduct constituting antitrust violations and the Union denied these allegations. Yet, despite this clear-cut question of fact concerning this conduct which the Judge in Supreme Court, New York County admitted constituted a violation of the antitrust laws, Judy Bond was denied a hearing to determine who was right as a matter of fact. This the Union states at page 7 of its brief was a ruling "upon the merits."

The Union attempts to justify the refusal to give Judy Bond its day in court by stating that all Judy Bond offered was "mere accusations, proof of no illegality and have no evidentiary value" (at page 7). But this statement misses the point. Judy Bond should not have been required to fully establish an antitrust claim upon affidavits. Rather, the most that could be required of Judy Bond was to indicate the existence of a bona fide antitrust issue. We submit that this was accomplished by

Judy Bond's allegations and given further color by the allegations contained in the antitrust complaint and the indictment filed against the very same Union and others in the United States District Court for the Southern District of New York. This indicated that the issues raised by Judy Bond were sufficiently serious and meritorious to warrant the issuance of the complaint and indictment by the United States Department of Justice and a grand jury. This should be enough to allow Judy Bond an opportunity to prove the antitrust issues herein. This is precisely the same right the Justice Department has with respect to the similar allegations of the complaint and indictment. As the Government's allegations can not be disposed of upon affidavits, so the allegations of Judy Bond should not be.

We believe that the relief Judy Bond seeks before this Court needs restatement. On the first question, it is not seeking a full and complete reversal of the arbitration awards at this time. Rather, it is merely seeking an opportunity to have a hearing at which it can present evidence which may give it the right to have the arbitration awards vacated. In essence, all that Judy Bond is seeking is its day in court before it is required to pay over a large sum of money to the Union. We submit that nothing the Union has said in any way impairs Judy Bond's right to be heard upon the issues of fact raised by it in these proceedings.

POINT III

Article 33(g) imposes a penalty for breach of contract and hence is contrary to Federal public policy.

With respect to the second question, the Union first contends that this concerns solely a matter of state law, since Judy Bond did not raise any Federal issues. This ignores the cases cited by the Union itself before Supreme Court, New York County such as *Local 174* v. *Lucas Flour Co.*, 369 US 95 (1962) which hold that these entire proceedings are governed by Federal law. It also ignores the fact that such Federal precedent as *Prichard & Sons* v. *United States*, 332 US 407 (1947) and *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25 (2nd Cir. 1963) were cited by Judy Bond to the Appellate Division and the Court of Appeals for the proposition that Article 33(g) of the contract is invalid as against Federal public policy.

The Union then goes on to state that an arbitrator in a labor case has complete discretion to frame whatever remedy suits his fancy. In other words, the Union is contending that the courts can in no way restrain any remedy devised by an arbitrator and that an arbitrator's discretion is consequently not limited by any consideration of public policy. We submit that this is clearly not the law and that the *Otis Elevator* case, *supra*, specifically contradicts this contention.

The Union concludes merely by citing a few cases which uphold liquidated damage clauses in general. The Union has completely failed to show that the specific clause before this Court, Article 33(g) covering a whole range of different violations and punishing them all at the arbitrary rate of a dollar per dozen is not a penalty.

Conclusion

We respectfully submit that nothing contained in the Union's opposition brief in any way effects the reasons stated in the petition for granting the petition for a writ of certiorari. Accordingly, for all the reasons stated in the petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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